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No. 99-1884

In the
Supreme Court of the United States

LACKAWANNA COUNTY DISTRICT ATTORNEY;
THE ATTORNEY GENERAL OF THE
COMMONWEALTH OF PENNSYLVANIA,
Petitioners,

v.

EDWARD R. COSS, JR.,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

BRIEF OF THE STATES OF COLORADO, ALABAMA, ALASKA, ARKANSAS, DELAWARE, KANSAS, MASSACHUSETTS, MICHIGAN, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, UTAH, VERMONT, VIRGINIA, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF PETITIONERS

KEN SALAZAR
Attorney General of Colorado
* ROBERT M. RUSSEL
Assistant Solicitor General
Department of Law
1525 Sherman Street
Denver, Colorado 80203
(303) 866-5785

Of Counsel:
Dan Schweitzer
National Association of
Attorneys General
750 First St., N.E.
Washington, D.C. 20002
(202) 326-6010

* *Counsel of Record*

[additional counsel listed on inside cover]

25 PP

BILL PRYOR
Attorney General of Alabama
State House
11 South Union Street
Montgomery, AL 36130

BRUCE M. BOTELHO
Attorney General of Alaska
P.O. Box 110300
Juneau, AK 99811

MARK PRYOR
Attorney General of Arkansas
200 Tower Building
Little Rock, AR 72201

M. JANE BRADY
Attorney General of Delaware
820 N. French St.
Wilmington, DE 19801

CARLA J. STOVALL
Attorney General of Kansas
301 S.W. 10th Avenue
Topeka, KS 66612

TOM REILLY
Attorney General of
Massachusetts
One Ashburton Place
Boston, MA 02108

JENNIFER M. GRANHOLM
Attorney General of Michigan
P.O. Box 30212
Lansing, MI 48909

JOSEPH P. MAZUREK
Attorney General of Montana
P.O. Box 201401
Helena, MT 59620

DON STENBERG
Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, NE 68509

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Capitol Complex
Carson City, NV 89710

PHILIP T. MCLAUGHLIN
Attorney General of New
Hampshire
33 Capitol Street
Concord, NH 03301

MICHAEL F. EASLEY
Attorney General of North
Carolina
P.O. Box 629
Raleigh, NC 27602

BETTY D. MONTGOMERY
Attorney General of Ohio
State Office Tower
30 East Broad St.
Columbus, OH 43215

W. A. DREW EDMONDSON
Attorney General of Oklahoma
State Capitol, Room 112
Oklahoma City, OK 73105

HARDY MYERS
Attorney General of Oregon
1162 Court Street, NE
Salem, OR 97310

JAN GRAHAM
Attorney General of Utah
236 State Capitol
Salt Lake City, UT 84114

WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, VT 05609

MARK L. EARLEY
Attorney General of Virginia
900 East Main Street
Richmond, VA 23219

CHRISTINE O. GREGOIRE
Attorney General of
Washington
1125 Washington Street
Olympia, WA 98504-0100

QUESTIONS PRESENTED

1. Does a federal habeas corpus petition that attacks a fully-expired conviction, but does not attack a later sentence that was enhanced based upon the expired conviction, satisfy the "in custody" requirement for federal habeas jurisdiction?

2. Did the court of appeals err in holding that, whenever a sentencing court considers a fully-expired prior conviction, a defendant is constitutionally entitled to challenge the validity of that conviction on federal habeas corpus review?

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INTEREST OF THE AMICI CURIAE

This case concerns the ability of federal habeas corpus petitioners to challenge fully-expired state convictions that are used to enhance sentences imposed for later state convictions. The state Attorneys General have a significant law enforcement interest in that issue. Collateral challenges to fully-expired prior convictions create significant practical problems, undermine the public's faith in the criminal process, and show disrespect for the states' own rules regarding when their convictions may properly be challenged.

STATEMENT OF THE CASE

A. The 1990 Case

Following a jury trial in the Court of Common Pleas of Lackawanna County, Pennsylvania, Respondent Edward Coss was convicted in September 1990 of aggravated assault and simple assault. Applying the Pennsylvania Sentencing Guidelines, 204 Pa. Code §303.1-303.14, the court sentenced Coss to six to twelve years' imprisonment. That sentence was within the range provided by the sentencing guidelines, after taking into account numerous prior convictions on Coss's record. On direct appeal, the Pennsylvania Superior Court, in December 1995, vacated the sentence due to concerns that the presentence report was not accurate. J.A. 62a.

At his 1996 resentencing hearing, Coss's counsel challenged the enhancement based on Coss's criminal record, arguing that his three misdemeanor convictions in 1986 all arose from the same transaction and, accordingly, his prior record "score" should be reduced from 3 to 2. The trial court agreed, but resentenced Coss to the same six-to-twelve-year sentence, which

remained within the standard sentencing guidelines range. J.A. 62a. In imposing sentence, the trial court stated:

> I've taken into consideration the statements by [Coss's attorney] and the seriousness and nature of the crime involved here, the well being and protection of the people who live in our community, your criminal disposition, your prior criminal record, the possibility of your rehabilitation, and the testimony that I've heard. . . .

J.A. 66a.

The Pennsylvania Superior Court affirmed the sentence in June 1997 (J.A. 61a); Coss did not pursue his direct appeal further. Also in June 1997, Coss filed a petition under Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. §9541 *et seq.*, in the trial court challenging his conviction and sentence. That petition is still pending. Coss did not allege, either at trial, on direct appeal, or in his PCRA application that the 1986 convictions should have been disregarded for purposes of determining his sentence for the 1990 offense.

In February 1997, while his direct appeal was still pending, Coss filed a habeas corpus petition in the United States District Court for the Middle District of Pennsylvania attacking the 1990 conviction. Less than two months later, the court dismissed the petition for failure to exhaust state court remedies.[1]

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[1] Neither Coss's 1997 federal habeas corpus petition nor his 1997 state PCRA petition is part of the record in this case. We have lodged with the Court a copy of those petitions, and a copy of the district court's docket entries with respect to the federal petition.

B. The 1986 Case

Coss's three 1986 misdemeanor convictions arose from Coss's punching a police officer and, following his arrest, destroying furnishings in his jail cell. He was convicted by a state jury of institutional vandalism, criminal mischief, and simple assault. In early 1987, the court sentenced Coss to six months to one year on the simple assault charge and six months to one year on the institutional vandalism and criminal mischief charges, to run consecutively. In February 1987, Coss filed a Petition for Reconsideration of Sentence, which was denied. A few months later, Coss filed a PCHA petition with the court, challenging the conviction and sentence on the basis of, *inter alia*, ineffective assistance of counsel. J.A. 46a-49a.[2] Coss was discharged from Pennsylvania parole supervision in early 1988. Pet. App. 6a. For reasons not in the record (but possibly because Coss had fully served his sentence), the court never acted on Coss's PCHA petition.[3]

In 1994, with his PCHA petition still technically pending in state court, Coss filed a *pro se*, form federal habeas corpus petition under 28 U.S.C. §2254. In

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[2] The predecessor to the PCRA was the Post-Conviction Hearing Act (PCHA), which had also been codified at 42 Pa. Cons. Stat. §9541 *et seq.*

[3] Under Pennsylvania law, post-conviction relief is not available to a petitioner who has been released from custody and is not on probation or parole. *Commonwealth v. Ahlborn*, 699 A.2d 718, 720-21 (Pa. 1997).

completing the form, Coss indicated that he was challenging the 1986 convictions. J.A. 1a (Dkt #1). The only reference Coss made to the 1990 conviction was in response to the inquiry whether "you have any future sentence to serve after you complete the sentence imposed by the judgment under attack." Coss added that he intended to file a separate attack on the 1990 judgment in the future. J.A. 1a (Dkt #1, at 7). In 1995 and 1996, with the assistance of counsel, Coss filed his Amended and Second Amended petitions. J.A. 11a (Dkt #44); J.A. 72a-75a. The amended petitions specifically challenged only the 1986 convictions, which they alleged were obtained in violation of Coss's Sixth Amendment right to effective assistance of trial counsel and his Fourteenth Amendment due process rights. *Id.* The amended petitions did not mention the 1990 conviction or sentence.

The United States District Court for the Middle District of Pennsylvania denied the Second Amended petition, finding that, although Coss's trial counsel's performance was objectively unreasonable, Coss failed to demonstrate prejudice. Pet. App. 95a-96a. The court explained that it had jurisdiction to entertain Coss's action because his 1986 conviction was used to enhance his sentence for the 1990 conviction. *Id.* at 105a-108a.

A panel of the court of appeals reversed, concluding that Coss had shown prejudice from his counsel's ineffective assistance during the 1986 trial. The court remanded to the district court with instructions that it order a writ of habeas corpus to issue conditioned upon Coss's being resentenced without consideration of the 1986 conviction. Pet. App. 51a, 81a. Two days later,

the court of appeals voted to rehear the case en banc, and vacated the panel opinion. *Id.* at 94a.

On rehearing en banc, the court reversed the district court on the same grounds as the panel had. With respect to its jurisdiction, the court interpreted *Maleng v. Cook*, 490 U.S. 488 (1989), as holding that a petitioner "satisf[ies] the 'in custody' requirement for federal habeas corpus jurisdiction when he asserts a challenge to a sentence he is currently serving that has been enhanced by the allegedly invalid prior conviction." Pet. App. 12a. Because Coss "contends that the sentence for his 1990 conviction was adversely affected by the 1986 simple assault conviction," the court concluded it had jurisdiction. *Id.* at 12a-13a. The court excused Coss's failure to exhaust his state court remedies because his PCHA petition had been pending for seven years. *Id.* at 13a. The court also recognized that Coss had not "presented the Pennsylvania state courts with his claim that the invalid 1986 conviction was used to enhance his subsequent conviction in 1990," but concluded that, because collateral relief for that sort of claim was not available under the PCHA or other state post-conviction remedies, further state proceedings would be futile. *Id.* at 13a-14a.

Turning to the remedy, the court of appeals stated that the "normal relief that we grant in habeas corpus is to order that the habeas petitioner be freed, subject to the right of society to correct in a timely manner the constitutional error through a new state proceeding." Pet. App. 22a. The court observed, though, that Coss could not be "freed" from his 1986 conviction because he has already served his time. Rejecting Coss's contention that the only available remedy was to

require the state to resentence him under the 1990 conviction, *id.* at 23a, the court extended to the state the option of retrying Coss for the 1986 offense. *Id.* at 28a. The court acknowledged that Coss would have to be resentenced under this 1990 conviction in any event, but felt that "comity requires us to afford the Commonwealth the opportunity to cure the original constitutional defect." The court expressed no opinion as to whether Pennsylvania law permits such a retrial. *Id.* at 28a-29a & n.14.

Two judges dissented on the ground that the 1986 conviction did not affect the 1990 sentence. *Id.* at 30a-35a. And two judges concurred in part and dissented in part, disagreeing only with the court's decision to afford the state the opportunity to retry Coss for the 1986 offense. *Id.* at 36a-49a. This Court granted certiorari on October 10, 2000.

SUMMARY OF ARGUMENT

1. Coss was not "in custody" under his 1986 conviction when he filed his habeas corpus petition. The court of appeals nevertheless found that Coss was "in custody" for purposes of this habeas action by construing his petition as an attack on the constitutionality of his 1990 sentence. But Coss's petition was unmistakably directed against the 1986 conviction, not the 1990 sentence, and there was no reason for the district court or court of appeals to treat it otherwise. This is particularly so because Coss had the assistance of counsel when he filed his two amended petitions.

The timing of the various proceedings confirms that Coss's petition attacked only his 1986 conviction.

Coss filed his initial habeas petition in 1994 and his amended petitions in 1995 and 1996, during which time his 1990 conviction and sentence were still on direct review in the state courts. Had Coss styled his habeas petition as an action against his 1990 sentence, it would properly have been dismissed for failure to exhaust state remedies. By misreading the procedural posture of the case and the true meaning of Coss's habeas petition, the court of appeals ran afoul of the simple command of *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989): a habeas petition does not satisfy the "in custody" requirement when it challenges only a fully-expired conviction, even when that conviction is used to enhance a later sentence.

2. Even if Coss's petition were directed at his 1990 sentence, he would not be entitled to habeas corpus relief because he cannot demonstrate a violation of federal law. *Custis v. United States*, 511 U.S. 485 (1994), teaches that a defendant is constitutionally entitled to challenge the validity of an earlier conviction used for sentence enhancement only when the defendant asserts a *Gideon* violation. Coss cannot assert a *Gideon* violation; he therefore lacks a free-standing constitutional right to challenge the 1990 sentence based on the alleged invalidity of his 1986 conviction. Nor can Coss show that state law gives rise to a due process right to challenge the validity of his 1986 conviction: the Pennsylvania Sentencing Guidelines appear not to authorize such collateral attacks; and in any event, Coss waived that claim by failing to raise it in state court.

3. Ignoring *Custis*, the court of appeals found that Coss had a constitutional right to challenge the validity of his 1986 conviction merely because it was

considered during sentencing in his 1990 case. If adopted here, this approach would increasingly involve the federal courts in reviewing old state convictions: any prisoner would be entitled to attack (on any ground) a fully-expired conviction simply by showing that his conviction was considered, during sentencing, by a court in any jurisdiction. This would drain limited resources and negate many rules and statutes that the states and the federal government have enacted to protect society's interest in the finality of criminal convictions.

ARGUMENT

Federal courts have jurisdiction to review the habeas corpus petition of a state prisoner only if the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 18 U.S.C. §2241(c)(2). Thus, when a habeas petitioner seeks to challenge the validity of a fully-expired state conviction that was used to enhance a later sentence, he must show that he is "in custody" under the conviction he is attacking and that the sentence enhancement violated federal law. Because Coss can make neither showing, the judgment below should be reversed.

I. Because Coss's Habeas Corpus Petition Attacked His Fully-Served 1986 Conviction, Not His 1990 Sentence, He Failed To Meet The "In Custody" Prerequisite To Federal Court Jurisdiction

In *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989), this Court clarified the "in custody" rules that apply when a habeas petitioner contends that a fully-served conviction was invalid and may not be used to enhance the sentence arising from a later conviction. In that situation, held the Court, the habeas petitioner is not "in custody" under the prior conviction, but he is "in custody" under the later conviction. The Court therefore found that the Ninth Circuit Court of Appeals erred when it held that Cook was still "in custody" under his earlier 1958 conviction. The Court then read Cook's *pro se* habeas petition broadly to assert a challenge not only to his 1958 conviction, but also to his 1978 sentence, as enhanced by the 1958 conviction. The Court ruled that, when read as a challenge to his 1978 sentence, Cook's petition satisfied the "in custody" requirement. These holdings directly resolve this case.

Coss's Second Amended habeas corpus petition attacked only his 1986 conviction; it did not mention, let alone attack, his 1990 sentence. *See* J.A. 73a ("The convictions which Coss challenges in the instant Habeas Corpus Petition are for institutional vandalism . . ., criminal mischief, . . . and simple assault . . . . *Commonwealth v. Coss*, No. 86-645, Lackawanna County Court of Common Pleas."). Coss filed his habeas corpus petition as part of the typical process of reviewing the 1986 conviction. First, he asked the trial court to reconsider the sentence (Pet. App. 104a); then

he sought to overturn the conviction by filing a post-conviction application in state court; and when the state court did not act upon the application for seven years, he filed his federal habeas corpus petition. Pet. App. 13a. Because the sentence imposed for Coss's 1986 conviction had expired, Coss's habeas corpus petition failed to satisfy the "in custody" requirement as delineated in *Maleng*.

It was simply wrong for the court of appeals to hold that the district court "appropriately construed [Coss's] petition as challenging the 1990 conviction, rather than his expired conviction." Pet. App. 12a. The most obvious problem with that "construction" is that the Second Amended petition did not even mention the 1990 conviction. Moreover, the petition could not possibly have attacked the 1990 sentence, for the direct appeal of that sentence was *sub judice* in the Pennsylvania Superior Court when Coss filed his initial habeas petition. And the Pennsylvania Superior Court did not affirm the resentence until June 1997—several months *after* a magistrate had issued a report and recommendation with respect to Coss's petition. *See* J.A. 61a-71a; Pet. App. 104a.

Thus, had Coss's petition truly challenged the 1990 conviction itself, it would have been unexhausted and procedurally barred. Only at the conclusion of direct and post-conviction review of the 1990 conviction and sentence could Coss have filed a fully-exhausted federal habeas corpus petition challenging that sentence. (Indeed, when, in 1997, Coss actually filed a federal habeas petition that attacked his 1990 conviction, the district court dismissed it as

unexhausted.)[4] And only if Coss had raised the validity of the 1986 conviction during his state court challenge to the 1990 conviction could he have properly pursued that claim on federal habeas review. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1990). But Coss did not attack the validity of the 1986 conviction at his 1990 sentencing or in his subsequent appeals.

Coss is not assisted by this Court's decision in *Maleng v. Cook* to construe Cook's *pro se* habeas petition as asserting a challenge to his 1978 sentence. First, Cook's habeas petition specifically asserted as its second ground for relief that his later sentence "has been unlawfully enhanced on the information of an invalid 1958 conviction." Joint Appendix, *Maleng v. Cook*, at 6A (filed Dec. 21, 1988). Coss's petition, in contrast, did not complain about the 1990 conviction and sentence. Second, Cook filed his petition *pro se* (*id.* at 8), whereas Coss filed his amended petitions through counsel. Third, when Cook filed his habeas petition, his later conviction and sentence (unlike Coss's) were not still on direct appeal. In sum, whereas all the surrounding circumstances of Cook's case suggested that his *pro se* petition was actually attacking the later sentence as well as the prior conviction, the language in Coss's habeas petition and

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[4] The Third Circuit found Coss's claim to be exhausted based on the futility exception, finding that Coss had no further state court forum in which to challenge the validity of his 1986 conviction. Pet. App. 13a-14a. A habeas corpus application is not exhausted, however, if the state court judgment remains pending on direct appeal. *See, e.g., Sherwood v. Tomkins*, 716 F.2d 632, 634 (CA9 1983). The Third Circuit also expressed concern that Coss's PCHA application had been sitting in state court for seven years (Pet. App. 13a), but it ignored that Coss had been released from custody less than two years after he filed the application.

the timing of the proceedings confirm that Coss was not—and could not possibly have been—challenging his 1990 sentence. A court does not have the discretion to construe a habeas corpus petition as an attack on a later conviction and sentence in these circumstances.

II. Even If Coss's Petition Were Directed At His 1990 Sentence, He Would Not Be Entitled To Habeas Corpus Relief Because, Under *Custis v. United States*, He Cannot Establish A Violation Of Federal Law

Coss does not have a free-standing right under the Constitution to challenge the use of his 1986 convictions in setting his 1990 sentence. In *Custis v. United States*, 511 U.S. 485, 493-97 (1994), this Court held that the Constitution provides a defendant the right to collaterally challenge a prior conviction before it is used to enhance a sentence only when the prior conviction was obtained in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963). And, as the United States explains in its brief in *Daniels v. United States*, No. 99-9136 (cert. granted Sept. 8, 2000), it necessarily follows that the Constitution provides the right to collaterally challenge the prior conviction on federal habeas corpus review only when a *Gideon* violation is alleged.

Coss has not alleged a *Gideon* violation. He therefore cannot demonstrate a violation of federal law, as is necessary to invoke habeas corpus jurisdiction, unless he can show that (1) the Pennsylvania Sentencing Guidelines authorize challenges to prior convictions on grounds other than *Gideon*, (2) he asserted such a challenge as a basis for attacking his

1990 sentence, (3) the trial court failed to consider the challenge or made a legal error in analyzing the validity of the prior conviction, and (4) such error by the court constituted a violation of federal, as opposed to state, law.

Coss cannot make the necessary showing. First, the Pennsylvania Sentencing Guidelines do not expressly authorize challenges to prior convictions: they neither provide a mechanism for such a challenge nor specify the grounds that would disqualify a prior conviction from being considered in sentencing. This strongly suggests that, when called on to decide the issue, the Pennsylvania Supreme Court will hold that the guidelines do not authorize challenges to prior convictions (absent *Gideon* claims).[5]

Second, Coss did not ask the 1990 trial court to disqualify his 1986 convictions from consideration in sentencing. Nor did he argue in the appeals of his 1990 conviction that his sentence was unconstitutionally enhanced by invalid 1986 convictions. Coss

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[5] The Pennsylvania Supreme Court's inquiry might be informed by the operation of the federal Sentencing Guidelines, which do not authorize collateral challenges to prior convictions. *See* Sentencing Guidelines §4A1.2, Application Note 6 (Nov. 1, 1993) ("this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction of sentence beyond such rights otherwise recognized in law (*e.g.*, 21 U.S.C. §851 expressly provides that a defendant may collaterally attack certain prior convictions)"); *see also Ryan v. United States*, 214 F.3d 877, 879-80 (CA7 2000) (the federal Sentencing Guidelines "use the *fact* of prior convictions as conclusive when calculating criminal history").

therefore cannot complain that the state courts overlooked or mishandled any such claim.[6]

Accordingly, even if we assume that Coss's habeas petition was directed against his 1990 sentence (as enhanced by the 1986 conviction), Coss would lose. Under *Custis*, Coss did not allege a "violation of the Constitution or laws or treaties of the United States," as required for federal court jurisdiction.

III. The Third Circuit Erred In Holding That, Whenever A Sentencing Court Considers An Expired Prior Conviction, A Defendant Is Entitled To Challenge The Validity Of That Conviction

Instead of engaging in the above analysis, the court of appeals merely inquired into "whether the sentencing court at the 1990 conviction took into consideration the 1986 conviction." Pet. App. 10a. After concluding that the sentencing court had taken the 1986 conviction into account, the court of appeals ruled that, under *Maleng*, the district court had jurisdiction under §2254 to review the validity of that conviction. *Id.* at 10a-13a. That reasoning not only

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[6] Even if Coss had challenged his 1986 conviction at his 1990 sentencing proceeding, and Pennsylvania expressly granted him the right to do so, it is still far from clear that a state court's error with respect to that challenge would be an error of federal law subject to federal habeas corpus review. *Compare Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (federal habeas corpus relief is not available for errors of state law), *with Hicks v. Oklahoma*, 447 U.S. 343 (1980) (defendant's federal due process rights were violated when state law requiring jury to fix punishment was not followed). The Court need not reach that issue in this case.

ignores the teachings of *Custis*, it would create significant practical problems if adopted by this Court. Countless state sentencing proceedings—whether under statutes granting judges broad discretion, under sentencing guidelines, or under recidivist schemes—take prior convictions "into consideration." To allow state prisoners to use §2254 to mount full-scale challenges to the validity of prior convictions in all such cases would nullify state and federal limitations on challenges to final judgments and impair the states' ability to protect the integrity of their criminal judgments.

Although the states employ a wide variety of post-conviction processes, all states have a common and compelling interest in protecting the finality of their criminal convictions. To this end, state post-conviction procedures employ statutes of limitations, custody requirements, doctrines such as forfeiture and laches, and presumptions of regularity. States may require post-conviction challenges to be made in the court where the conviction was obtained, and may provide for streamlined procedures for such challenges, including limitations on the right to a hearing.

The federal approach is similar. Even before enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA), federal habeas review was limited by the doctrines of abuse of the writ, procedural default, exhaustion, and non-retroactivity. The AEDPA stiffened many of those rules and added new limits, such as the one-year limitations period codified at 28 U.S.C. §2244(d). These procedural limitations serve to protect the states against, *inter alia*, having to defend stale convictions.

The court of appeals' approach would effectively abrogate many of these state and federal procedural limitations. If a defendant has the right to premise a full habeas attack on the mere fact that his conviction is later used in sentencing, then it hardly matters whether he earlier sought review of his conviction or whether he followed the proper procedures in doing so. For defendants who unsuccessfully pursued direct, post-conviction, and federal habeas review, the court of appeals' approach would offer an "enhancement exception" to the various rules that govern second and successive petitions. For those who failed to pursue state remedies, the court of appeals' approach would avoid the doctrines of exhaustion and procedural bar.

The practical problems would be considerable if states were required to defend in federal court every challenge to a prior criminal conviction that was possibly used to enhance a later sentence. Even assuming that the great majority of such challenges would be without merit, state prosecutors faced, for instance, with claims under *Boykin v. Alabama*, 395 U.S. 238 (1969), would be forced to reconstruct guilty plea colloquies, locate the attorneys who were present during the colloquies, and possibly locate the sentencing judge.

Similarly difficult would be defense of ineffective assistance claims, where records, attorneys, and the trial judge may no longer be available or (as occurred here) the defense attorney can no longer recall the facts and strategic considerations that informed her trial decisions. *See* Pet. App. 8a-9a & n.7. These difficulties would be greatly magnified when out-of-state convictions were among those considered at sentencing. Assuming out-of-state witnesses could be located and

summonsed under interstate compacts, the cost of transportation and housing alone might prove prohibitive.

The difficulties of permitting challenges to fully-expired convictions at later sentencing proceedings are illustrated by the remedy the court of appeals imposed in this case after holding that the 1986 conviction was invalid. The court remanded with instructions that the district court issue a writ of habeas corpus (which would allow Coss to be resentenced) conditioned on giving the state the option of retrying Coss for the 1986 conviction. Pet. App. 28a-29a. Although the court saw itself as giving the state the opportunity "to cure the Sixth Amendment defect," *id.* at 23a, its solution is rather problematic. It would be unusual for a state to retry a person for an offense where (1) he has already fully served his sentence, and (2) the conviction has not actually been vacated or overturned. Whether or not state and federal law actually permit such a retrial, the very fact that the court of appeals saw fit to propose such an odd remedy highlights the difficulties that will ensue if courts must routinely permit challenges to the validity of prior convictions.

As *Custis* makes clear, the Constitution requires an inquiry into the validity of prior convictions used at sentencing only when the alleged failing is the denial of counsel under *Gideon*. Where a petitioner challenges his current sentence, his claim is that fundamental elements of due process were lacking *at sentencing*. *See, e.g., Townsend v. Burke*, 334 U.S. 736, 741 (1948) (due process violated where the sentencing court relied on a materially false statement of the defendant's record of convictions). A claim that an uncounseled prior conviction, obtained in violation of

Gideon, was used at sentencing is properly viewed as a challenge to the sentencing process, and not as a "back door" challenge seeking to reopen the prior conviction itself. As this Court emphasized in *Custis*, a *Gideon* violation is a "unique constitutional defect," 511 U.S. at 496, that historically was considered to impair jurisdiction. *Id.* at 494. For this reason, a *Gideon* violation occupies a sufficiently unique place in constitutional law as to implicate due process principles that are inherent in a later sentencing proceeding. *See id.* at 496.

By contrast, other types of constitutional challenges to prior convictions, such as challenges to a guilty plea colloquy under *Boykin* or claims of ineffective assistance of counsel, do not "rise[ ] to the level of a jurisdictional defect resulting from the failure to appoint counsel at all." *Custis*, 511 U.S. at 496. As a general matter, enhanced punishment for the latest crime is properly viewed as "a stiffened penalty" for that offense, not as additional punishment for the commission of the prior crimes. *Gryger v. Burke*, 334 U.S. 728, 732 (1948).

Although a legislature is entitled to mandate that a sentencing court inquire into all alleged defects in a prior conviction, *see* 21 U.S.C. §851 (discussed in *Custis*, 511 U.S. at 491-92), it is not required to do so. This is consistent with our nation's longstanding tradition of giving sentencing judges latitude to consider a broad range of factors when determining the appropriate sentence, including prior criminal conduct that did not result in a conviction, *see Williams v. New York*, 337 U.S. 241, 244-47 (1949), and even conduct for which the defendant has been acquitted, *see United States v. Watts*, 519 U.S. 148, 152-56 (1997).

The Third Circuit wrongly ignored the fundamental distinction between *Gideon* claims and non-*Gideon* claims in this context and wrongly assumed that non-*Gideon* challenges to prior convictions can always be alleged in federal reviews of later sentencing proceedings.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

KEN SALAZAR
Attorney General of Colorado
* ROBERT M. RUSSEL
Assistant Solicitor General
Department of Law
1525 Sherman Street
Denver, Colorado 80203
(303) 866-5785
Counsel for *Amici* States

Of Counsel:
Dan Schweitzer
National Association of
Attorneys General
750 First St., N.E., Suite 1100
Washington, D.C. 20002
(202) 326-6010

* *Counsel of Record*

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